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No. 84-1515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners

v.

TRI-STATE MOTOR TRANSIT CO., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR TRI-STATE MOTOR TRANSIT CO., *ET AL.* IN OPPOSITION

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STATEMENT

This brief in opposition is filed by Tri-State Motor Transit Co. ("Tri-State"), American Trucking Associations, Inc. ("ATA"), and International Brotherhood of Teamsters, Etc. ("IBT").

The petition of the Interstate Commerce Commission ("ICC") and the United States (hereafter jointly "the government") is brought to review the same judgment of the Court of Appeals which is the subject of the petition for certiorari in No. 84-1518 filed by Tri-State, ATA

and IBT. That judgment affirmed a decision of the ICC granting to respondent Denver & Rio Grande Western Railroad Company ("Rio Grande") an unrestricted license to engage in motor carrier operations. The ICC proceedings are described at Pet. 4-5 [1] and more fully in our petition in No. 84-1518, pp. 8-10, to which we respectfully call the Court's attention. Specifically, the license was challenged by Tri-State on the ground that because the applicant, Rio Grande, is a railroad, any motor carrier operating license issued to it should be restricted to operations "auxiliary and supplemental to" the Rio Grande's railroad operations absent a showing of "special circumstances" which render that restriction unnecessary to the public interest.

Beginning in 1938 the ICC had imposed such restrictions on railroad carriers and their affiliates in accordance with what has been known as the "special circumstances" doctrine, see Pet. for Cert. in No. 84-1518, pp. 3-6, which, as we urge, *id.* at 10-15, was ratified by Congress in 1940 and approved as Congressional policy by this Court. However, the ICC abolished the "special circumstances" doctrine in a final Policy Statement issued in Ex Parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (served January 6, 1983), affirmed in *American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243 (C.A. 5), cert. den., 53 U.S.L.W. 3324 (1984).

The ICC overruled Tri-State's objection to the unrestricted certificate on the basis of that Policy Statement. See Pet. 14a-16a. On a petition for review filed by Tri-State and ATA and joined by IBT as intervenor, the Eighth Circuit affirmed the order granting unrestricted operating authority to the Rio Grande. That Court held,

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[1] "Pet." will refer to the government's petition for a writ of certiorari in this case, No. 84-1515. The petition for certiorari filed by the present respondents, Tri-State, ATA and IBT, will be referred to as "Pet. No. 84-1518".

in agreement with the Fifth Circuit in *American Trucking Associations* that the ICC acted within its authority when it abandoned the "special circumstances" doctrine. (See Pet. 6; Pet. No. 84-1518, 9-10.) It therefore entered an order *affirming* the decision of the ICC (Pet. 8a, 9a.) The government parties petitioned for rehearing en banc on the Hobbs Act issue they renew here. The petition was denied. (Pet. 10a.)

I. BECAUSE THE GOVERNMENT PREVAILED ON THE MERITS BELOW, ITS PETITION DOES NOT PROPERLY INVOKE THIS COURT'S JURISDICTION.

(a) The government correctly anticipates "that respondents will urge the Court not to grant [its] petition because the government generally prevailed in the court of appeals." (Pet. 13.) Indeed, the characterization "generally" is too modest an assessment of the government's success below. The case was before the Court of Appeals on a petition for review by Tri-State and the ATA; the IBT intervened in support of that petition. The Court of Appeals, overruling the jurisdictional contention which the government seeks to renew here, reached the merits, and on the merits sustained the Commission's order. It therefore dismissed the petition for review in its entirety. The practical effect on the parties to this litigation of the difference between the court's order "affirming" and the "dismissal for lack of jurisdiction" which the government prefers (and which it wishes this Court to require the court below to enter) is exactly nil. Under either form of order the Commission's underlying decision granting the challenged license to respondent Rio Grande would be sustained so that Tri-State and the other objecting parties would be left without any judicial recourse. If there were any possible practical differences between the outcome in the court below and the order which the Government urges that that court should have entered, respondent Rio Grande would be supporting or opposing the

government's petition, rather than asserting neutrality, as it has. The government could not have prevailed more completely. For this reason the government's petition does not properly invoke the jurisdiction of this Court.

(b) In *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326 (1980), this Court wrote:

> Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934); *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451 (1854); 9 J. Moore, Federal Practice ¶ 203.06 (2d ed. 1975). The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III. [445 U.S. at 333-334] [2]

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[2] In *Roper*, the Court held that the court of appeals had jurisdiction to entertain an appeal from the denial of class certification taken by plaintiffs in a class action whose own individual claims had been terminated by the entry of the judgment in their favor in the full amount of the claim on the basis of a tender by the defendant. The district court's denial of class certification deprived the individual plaintiffs of their "continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who would share in its benefits if the class is certified and ultimately prevails." 445 U.S. at 336. Thus, they were aggrieved by that order, and there was a continuing live controversy with practical consequences depending on its outcome. It is this recognition of plaintiffs' separate interest in the viability of the claim of the class that preserved the *Roper* case for appellate review.

Roper involved an appeal from a district court to a court of appeals, but each of the cases cited in the foregoing passage involved the appellate jurisdiction of this Court. And while, by its reference to "any party" the literal language of 28 U.S.C. § 1254(1) is broad enough to encompass the successful winning party before the court of appeals, there is no indication that Congress contemplated that this Court' certiorari jurisdiction would differ so substantially from general federal appellate practice. As the Court explained in *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 545 (1924): "The language, circumstances and history of the enactment [which added the phrase 'upon the petition of any party thereto'] make clear the intent of Congress to give this Court jurisdiction on the petition of the United States to bring up criminal cases on writ of certiorari."

We are informed by the leading treatise on practice in this Court that "while some winning parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court has considered the problem or has granted a petition filed by a party who prevailed on the merits in the court of appeals." [3] None of the cases cited by the government supports its claim that jurisdiction exists. (Pet. 13, n.13.)

The government asserts that the

> present case is indistinguishable in principle from *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980) and *NRC* v. *Lorion*, No. 83-1031 (Mar. 20, 1985), in which the Court granted certiorari al-

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[3] Stern and Gressman, *Supreme Court Practice* (5th ed., 1978), p. 58. While the treatise states neither that the Court would or would not have jurisdiction over a petition like that filed by the government here, it observes that "to entertain such a petition would seem to be inconsistent with the Court's settled refusal to entertain an appeal by a party successful in obtaining a final judgment in his favor in the lower court." (*Id.* at 59, citing cases.)

> though the petitioners had "prevailed" in the courts below, in that the court had rebuffed a challenge to an administrative action, albeit on the erroneous ground that it lacked jurisdiction. [Pet. 13, n.13] [4]

Neither the *Harrison* nor *Lorion* case discussed this Court's jurisdiction and those cases therefore have no precedential force on this subject. In any event, the reason why jurisdiction was proper in those cases (which are identical to each other in this regard), and why those cases differ fundamentally "in principle" from this case, is clear enough. The petitioning agencies in *Harrison* and *Lorion* were aggrieved by the judgments of the courts of appeals in those cases, because those judgments relegated the agencies to a different forum (a district court) to litigate the same controversy against the parties which had opposed the administrative orders.

Thus, the judgments of the courts of appeals were only formally favorable to the agencies (in the sense that they dismissed petitions for review of administrative orders), but in practical effect, were adverse to the agencies. It would have been a mere empty formalism to hold that the agencies could not seek review from those judgments, to obtain from this Court an order directing the court of appeals to assert its proper jurisdiction and decide the case on the merits.[5]

The other cases cited by the government likewise fail to support its assertion that there is jurisdiction over its petition. It was not contended in *Director, OWCP* v.

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[4] *NRC* v. *Lorion* was decided *sub nom. Florida Power & Light Co.* v. *Lorion*, No. 83-703, 53 U.S.L.W. 4360 (March 20, 1985).

[5] In this regard, *Harrison* and *Lorion* are much like *Roper* in that a question collateral to the merits, but with important practical consequences in the same litigation, had been decided against them.

Perini North River Associates, 459 U.S. 297 (1983), that the judgment of the court of appeals had been favorable to the Director. Indeed, that judgment was contrary to his actual position there. See 652 F.2d 255 at 258. Thus, the ruling that, as a party in the court below, he was a "party" entitled to seek certiorari under 28 U.S.C. § 1254(1) is not precedent for the government's position. In *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), the Court of Claims' judgment was adverse to the petitioning Tribe, whose suit for compensation was dismissed.[6]

In *United States* v. *Nixon*, 418 U.S. 683 (1974), the government sought certiorari before judgment in the court of appeals. It was the successful party *in the district court*, and the jurisdiction of the court of appeals had been invoked by the losing party in the district court, Mr. Nixon. To construe "any party" in 28 U.S.C. § 1254(1) to include the successful party in the *district court* where the court of appeals has rendered no judgment—as this Court did in *Nixon*, and in other cases in which the court of appeals has been thus bypassed—is necessary lest the losing party in the district court be empowered to control

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[6] The government's observation that in *Menominee Tribe* "petitioners as well as the government sought affirmance" is incomplete and misleading. The Court of Claims dismissed a suit brought by the Tribe to obtain compensation from the United States for the loss of rights under a treaty which the Wisconsin Supreme Court had previously held resulted from an Act of Congress. The result which the Tribe preferred was a ruling by this Court that those rights had not been lost, which would have meant that no compensation was due, and the judgment of the Court of Claims would be affirmed for that reason. However, the Tribe asserted that if it failed on that issue, compensation should be awarded, and the judgment of the Court of Claims reversed. A majority of this Court ultimately held in the Tribe's favor on the first point, therefore affirming; the dissenting justices would have held against the Tribe on that point but would have awarded compensation, therefore reversing.

the course of the litigation and frustrate this Court's immediate consideration of exceptionally important cases. But the practice of allowing immediate review of the district court judgment on certiorari at the request of either party differs totally from the practice which the government seeks to inaugurate by its petition in this case.[7]

(c) As the Court reiterated in *Roper*, *see* page 4, *supra*, even if there is statutory jurisdiction in the appellate court, there must also be a continuing "case or controversy" for purposes of Article III. The Court's Article III jurisdiction over the government's petition hangs on a thread—and that thread is the present respondents' petition in No. 84-1518. For this reason, as we shall show, this would be an especially inappropriate case in which to grant certiorari at the behest of a party which pre-

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[7] *See* Stern, *Appellate Practice in the United States* (1981), pp. 125-126:

> In the United States Supreme Court and a number of states, the procedure for bypassing the intermediate appellate court has one novel feature. The request or application may be made by the *winning* party below as well as the loser. The latter must first have taken an appeal to the intermediate appellate court, which requires docketing the appeal in that court. * * * After that has been done, however, either party may request that the appeal be transferred to a higher court. In the usual appellate situation to allow the winner to appeal from a decision in his favor, from which the loser was not appealing, might well present an issue as to the existence of a continuing justiciable case or controversy. But no such problem can arise when the practical effect of a request for immediate decision by the highest court is merely to transfer an appeal by a loser from one appellate court to another. [Footnotes omitted, emphasis in original.]

In a footnote to this passage, Mr. Stern reiterates the observations in the Supreme Court practice treatise (co-authored with Mr. Gressman) that 28 U.S.C. § 1254(1) literally permits a successful party in the court of appeals to seek certiorari, but that "[n]o case has been found * * * in which a victorious party was enabled to take an appeal in the first instance." (*Id.* at n.27.)

vailed fully in the court of appeals, even if 28 U.S.C. § 1254(1) authorizes such a petition.

In denying that the change which it seeks in the judgment of the court below is "solely academic", the government points only to the "risk of further improper proceedings if the jurisdictional holding remains undisturbed, *i.e.*, review of the *merits* by this court on a petition filed by respondents." (Pet. 13, emphasis in original.) But that "risk" is realistic, and the controversy between these parties remains alive only by virtue of the petition for certiorari which Tri-State, *et al.*, have filed in No. 84-1518 to review the judgment of the court below.

If that petition had not been filed, that risk would have been eliminated even in theory. So too, if the petition in No. 84-1518 is denied, as the government there urges, there will no longer be a case or controversy between the parties, for the present respondents, Tri-State, *et al.*, will no longer have any opportunity to obtain reversal of the ICC's order granting to respondent Rio Grande an unrestricted motor carrier operating certificate. On the other hand, if the petition in No. 84-1518 is granted, the government could obtain complete relief from the court of appeals' ruling on jurisdiction. The government can reassert its position that the court of appeals was without jurisdiction under the Hobbs Act, and this Court must, of course, decide that issue before reaching the merits of the Interstate Commerce Act issue which are raised by that petition. Whether the petition in No. 84-1518 is granted or denied, there is no risk whatsoever that there will be a "review of the *merits* by this court"—let alone a judgment favorable to the present respondents—without a prior adjudication of the Hobbs Act jurisdictional issue by this Court.

II. THE QUESTION RAISED BY THE GOVERNMENT'S PETITION IS INSUBSTANTIAL.

(a) On the merits the court of appeals' jurisdictional ruling is entirely correct, and accords with the law in the other circuits which have ruled on the issue.

In rejecting the government's argument that the Hobbs Act bars consideration of the legality of the policy which the ICC enunciated in Ex Parte No. MC-156, the court below reasoned:

> We agree that this rule now precludes an attack on the procedure by which the policy was adopted. However, we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule, even if more than sixty days have elapsed since its issuance. As the District of Columbia and Fifth Circuits have noted, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Texas* v. *United States*, 730 F.2d 409, 415 (5th Cir. 1984) (quoting *Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).) [Pet. 4a-5a, n.2]

As the *Texas* and *Functional Music* cases show, the Fifth and District of Columbia Circuits have also refused to confine substantive review of a rule to the statutory period immediately following its promulgation. In the *Texas case*, after the decision below issued, the Fifth Circuit denied the government respondents' petition for rehearing en banc on the Hobbs Act issue. Simultaneously the panel withdrew its original opinion and substituted an opinion which differs only in a presently immaterial respect, and again quotes the passage from *Functional Music* which the court below also adopted. (749 F.2d 1144, 1146-1147 (C.A. 5, January 7, 1985)). *Functional Music*, the leading case in the D.C. Circuit, has re-

peatedly been followed, *e.g.*, *Network Project* v. *FCC*, 511 F.2d 786, 789, n.1 (C.A. D.C. 1975); *Geller* v. *FCC*, 610 F.2d 973, 978 (C.A. D.C. 1979); *Montana* v. *Clark*, 749 F.2d 740, 744, n.8 (C.A. D.C. 1984). *Functional Music* has also been followed by the Seventh Circuit in *Illinois Central Gulf R. Co.* v. *I.C.C.*, 720 F.2d 958, 960-961 (1983).

(b) The government's assertion that "the procedure/substance distinction has no support in the case law" (Pet. 10), is wholly inaccurate. Indeed, in *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 666 F.2d 595, 601-602 (C.A. D.C. 1981) (hereafter "*NRDC*"), cited at Pet. 9-10 and at Pet. 11, that distinction was expressly drawn; in dismissing the petition for review the court distinguished *Functional Music*, *supra*, and *Geller*, *supra*, on the precise ground that those cases involved claims of "*substantive invalidity*" (see *id.* at 602, emphasis in original).[8] *Montana* v. *Clark*, 749 F.2d at

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[8] The Court of Appeals said:

> The 60 day period for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts. This time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations. These policies would be frustrated if untimely procedural challenges could be revived by simply filing a petition for rulemaking requesting rescission of the regulations and then seeking direct review of the petition's denial. Indeed, the implications of the rule of law urged by the NRDC are staggering, for its logic knows no bounds; such a rule would permit procedural challenges to be brought twenty, thirty, or even forty years after the regulations were promulgated. No greater disregard for the principle of finality could be imagined.
>
> We are aware that the right to petition for repeal of a rule is recognized by both the APA and the Commission's rules. We also acknowledge that we have scrutinized regulations immune from direct review by reviewing the denial of a subse-

744, n.8 approved *NRDC* on this very point: "* * * the court in *NRDC* explicitly acknowledged that where, as here, the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review. 666 F.2d at 602." The "procedure/substance distinction" was also followed by the Fifth Circuit in *Texas*, 749 F.2d at 1146, text and note at n.28, citing *NRDC*, *Functional Music* and *Illinois Central Gulf*.

(c) The government boldly asserts that the "ruling below conflicts with decisions of other courts of appeals that have held the Hobbs Act's time limit to be jurisdictional." (Pet. 11.) The claimed intercircuit conflict is entirely spurious. The court below did not deny (and we agree) that the Hobbs Act's time limit is jurisdictional; that is the only issue on which the five assertedly conflicting court of appeals decisions (*id.*) support the government. Rather, the court below disagreed with the government's position on the entirely distinct question of what that jurisdictional time limit means in the context of subsequent litigation involving the substance of the rule. On that issue, which alone is presented by the government's petition, the decision of the court below is, as we have seen, in accord with those decisions of the Dis-

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quent rulemaking petition which challenged the regulations on demonstrable grounds of *substantive* invalidity. For example, we have permitted such indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation, or when changed circumstances have alleged deprived regulations of their factual foundation and have thereby brought them into conflict with such legislation. NRDC has cited no case, however, and we are not aware of any, that has allowed the foregoing authority to permit back door procedural challenges by those who had the opportunity to seek direct review of regulations but failed to do so in a timely fashion. [666 F.2d at 602, footnotes omitted, emphasis in original]

trict of Columbia Circuit in *NRDC* and *Geller*; in this connection we specially invite the Court's attention to pp. 11-12, n.8, *supra*, quoting the *NRDC* opinion. The other three cases cited at Pet. 11 do not address the present issue at all, but deal with questions concerning when the 60-day jurisdictional period begins to run.[9]

(d) The government expresses concern that if the courts of appeals "feel free to entertain challenges to the substantive validity of this same ICC rule," "uncertainty will prevail and litigation will abound." (Pet. 13, 14.) That prospect is indeed real, because, contrary to the government's argument elsewhere in the petition, the courts of appeals have rejected its interpretation of the Hobbs Act; *Texas* v. *United States* and *Montana* v. *Clark*, cited at Pet. 13, n.13 are the most recent decisions of the Fifth and District of Columbia Circuits on this point. See pp. 10, 11-12, *supra*. But it does not follow that the government's petition should be granted, for it is most unlikely that the "uncertainty" can be removed in No. 84-1515. Putting the matter most favorably to the government, both this Court's jurisdiction over its petition and the merits of its Hobbs Act theory are questionable at best. If either of those issues is decided against the government, the "uncertainty" concerning the validity of the ICC's new policy will remain. Only a decision in No. 84-1518 can resolve the matter, either by sustaining the government's Hobbs Act jurisdictional position, which must be reached first, *see* p. 9, *supra*, or by adjudicating the merits of the validity of the "special circumstances" doctrine.

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[9] In each of those cases the petitions were held to be timely. *New York* v. *United States*, 568 F.2d 887, 892-983 (C.A. 2 1977); *Chem-Haulers, Inc.* v. *United States*, 536 F.2d 610, 613-616 (C.A. 5 1976); *Microwave Communications, Inc.* v. *FCC*, 515 F.2d 385, 388-390 (C.A. D.C. 1974).

CONCLUSION

For the foregoing reasons, the petition for certiorari in No. 84-1515 should be denied.

Respectfully submitted,

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